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No. 18,535

IN THE

United States Court of Appeals

For the Ninth Circuit

ANTOINETTE BORNHOLDT, et al.,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

OPENING BRIEF FOR APPELLANTS

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Subject Index

Page

Jurisdiction 1

Statement of the case 2

Specification of errors 7

Summary of argument 9

Argument 9

I

Appellee has ceased to occupy the premises in question for railroad purposes 9

A. The Capwell Lease was for a term of five (5) years and was not subject to termination by the railroad or by the Public Utilities Commission 9

1.

The lease itself is clear and unambiguous as to its terms and as to the lack of any right of the railroad to terminate the same on short notice 11

2.

The lease in question is a valid five-year lease despite any provision of Section 851 of the Public Utilities Code 13

3.

General Order 69 of the Public Utilities Commission is not applicable to the Capwell Lease 18

a.

The Capwell Lease is not a property interest in the nature of an easement 18

b.

The Capwell Lease is not a license 19

c.

The Capwell Lease is not a permit 20

d. Page

The grant of the Capwell Lease was not made conditional upon the right of the grantor either upon its own motion or upon order of the Public Utilities Commission to commence or resume the use of the property in question whenever it might appear in the interests of its service to its patrons or consumers that it would be necessary or desirable so to do 21

B. By placing it beyond its power to use said parcel for five (5) years, the appellee has ceased to occupy the premises for railroad purposes 22

1.

Nature of the grant 22

a.

The grant in question conveyed a right-of-way or easement for railroad uses 23

b.

If the deed in question did not convey an easement or a right-of-way, then it conveyed title in fee simple subject to a right of entry for condition broken or a determinable fee simple 24

C. An analysis of the words in question clearly indicates the condition has been breached 24

1.

Cease 24

2.

Railroad purposes 25

3.

Occupy 30

4.

Cease to occupy 30

5. Page
Said premises 30

D. A very recent decision of the California District Court of Appeal supports appellant's position 34

II

Appellants are the owners of the parcel in question and are entitled to maintain this action 36

A. The findings of fact show that appellants are the owners of said parcel 36

B. Appellants and their predecessors in interest have conveyed away the adjacent property by metes and bounds description, none of which described the station grounds or the right-of-way and thus appellants still retain an interest in these two parcels of property 37

III

Conclusion 43

Table of Authorities Cited

Cases

Pages

Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 24
Atchison, Topeka and Santa Fe Railway Co., 48 P.U.C. 160 15
Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123 (Georgia) 31

Berton v. All Persons, 176 Cal. 610, 170 Pac. 151..... 40
Bond v. Texas and P. Ry. Co. (Louisiana) 160 So. 406 (1935) 27, 28
Bradmer v. Vasques, 102 Cal. App. 2d 338, 227 P. 2d 559 (1951) 24, 25

City of Glendora v. Faus, 148 Cal. App. 2d 920, 307 P. 2d 976 (1957) 23, 27
City of Long Beach v. Pacific Elec. Ry., 44 Cal. 2d 599, 283 P. 2d 1036 (1955) 26
City of Redlands v. Nickerson, 188 Cal. App. 2d 118, 10 Cal. Rptr. 431 (1961) 40

Pages

City of Santa Monica v. Jones, 104 Cal. App. 2d 463, 232 P. 2d 55 9
Coast Valleys Gas & Electric Co., 13 C.R.C. 309 (1917) 15
Connolly v. Des Moines & Central Iowa Co. (Iowa) 68 N.W. 2d 320 (1955) 27, 28

Eagle Rock W. Co., 13 C.R.C. 212 (1917) 15
East Bay W. Co., 13 C.R.C. 336 (1917) 15
Eastman v. Piper, 68 Cal. App. 554, 229 Pac. 1002 (1924) 19

Faus v. Pacific Elec. Ry. Co., 146 Cal. App. 2d 370, 303 P. 2d 814 (1956) 26

Goodman v. Southern Pacific Co., 143 Cal. App. 2d 424. 299 P. 2d 321 .....41, 42

Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 Pac. 896 (1930) .....N..... 20
Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P. 2d 15 (1956) 23

Jones v. Braumbach, 193 Cal. 567, 226 Pac. 400 (1924) 40

Kaiser Co. v. Reid, 30 Cal. 2d 610, 184 P. 2d 879 (1947) .. 20

Lundgren v. Freeman (9th Cir. 1962) 307 F. 2d 104..... 11

McDougall v. Palo Alto School District, 212 A.C.A. 420. .24, 34, 35

People v. Silver, 16 Cal. 2d 714, 108 P. 2d 4 (1940)..... 16
People v. Simon, 66 Cal. App. 2d 860, 153 P. 2d 420 (1944) 30

Quehl v. Peterson, 49 N.W. 390..... 30

Rosecrans v. Pacific Elec. Ry. Co., 21 Cal. 2d 602, 134 P. 2d 245 (1943) 26

Severy v. Central Pacific R. R. Co., 51 Cal. 194 (1875).... 39
Sparrow v. Dixie Leaf Tobacco Co. (North Carolina) 61 S.E. 2d 700 (1950) 27
Speer v. Blasker, 195 Cal. App. 2d 155, 15 Cal. Rptr. 528 (1961) 39
Tamalpais Land and Water Co. v. N. W. Pac. RR. Co., 73 Cal. App. 2d 917, 167 P. 2d 825 (1946).....23, 31

Pages

Virginian Railway Co. v. Avis, 98 S.E. 638 (Virginia) 27, 31, 32

Von Goerlitz v. Turner, 65 Cal. App. 2d 425, 150 P. 2d 278 (1944) 19

Warden v. South Pasadena Realty, etc. Co., 178 Cal. 440. 174 Pac. 26 (1918) 39

Weber v. Santa Barbara County, 15 Cal. 2d 82, 98 P. 2d 492 (1940) 16

Codes

California Civil Code:
Section 831 ..... 37, 38
Section 1112 ..... 37, 38, 39, 40

California Code of Civil Procedure:
Section 1858 16

California Public Utilities Code:
Section 851 ..... 13, 14, 15, 16, 21

28 U.S.C. 1332 1

Orders

General Order No. 69, Public Utilities Commission ... 10, 14, 18, 21

Texts

44 Am. Jur. 345 9

Black, Law Dictionary, Fourth Edition 20

45 Cal. Jur. 2d, Statutes at 626 16

45 Cal. Jur. 2d, Statutes at 627 ..... 16, 17

74 C. J. S. 500 26

74 C. J. S. 508 26

Restatement of the Law of Property:
Page 2904 19
Section 450 D, subpar. D 18, 19
Section 514(b) 19

Professor Harold E. Verrall, Future Interests in California, 7 West's Civil Code Ann., p. 1 24

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OPENING BRIEF FOR APPELLANTS

JURISDICTION

This is an action to quiet title or, in the alternative, for damages for inverse condemnation of plaintiff's property. This action was originally filed in the Superior Court of the State of California, in and for the County of Contra Costa. Thereafter, a petition for removal from the State Court to the United States District Court for the Northern District of California, Southern Division, was filed by defendant. (R. 5.)

The District Court had jurisdiction under 28 U.S.C. 1332, as said section read on September 11, 1957, the date that Southern Pacific Company's petition for removal was filed with the District Court. (R. 5.)

The first amended complaint (R. 38) shows the defendant to be a corporation, incorporated under the laws of the State of Delaware, and also shows the amount in controversy to be in excess of $3,000.00, which was the jurisdictional minimum of the District Court at the time this action was filed.

STATEMENT OF THE CASE

The evidence which is substantially not in conflict shows that appellants' predecessor in interest, A. S. Botello and Maria Silva Botello, his wife, granted to Appellee's predecessor in interest, Southern Pacific Railroad Company, two adjacent strips of land, each being 100 feet in width. One of the strips of land, which is not the subject of this litigation, was for a portion of the railroad line between San Ramon and Avon. (R.T. 31-32. See Ex. V.) The railroad tracks for this line are located on this 100 foot strip and for purposes of this brief this strip will be referred to as the "right-of-way." By another Deed, dated August 6, 1890, (Ex. C) the provisions of which are crucial to this litigation, another 100 foot strip of land immediately adjacent to the "right-of-way" was acquired to construct the railroad station. This strip, consisting of approximately 4.04 acres, will be referred to in this brief as the "station grounds."

This Deed to the "station grounds" provided:

> "That the said parties of the first part [A. S. Botello and Maria Silva Botello] for and in con-

> sideration of the sum of One Dollars Gold Coin of the United States of America, to them in hand paid by the said party of the second part [Southern Pacific Railroad Company] the receipt whereof is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm, unto the said party of the second part, and to its successors and assigns forever, . . ."
>
> [Here followed a description of the real property being conveyed.]

Following a description of the real property, the Deed contained the following provision:

> "Provided that if ever party of the second part, or its successors, shall cease to occupy said premises for railroad purposes, then all of the right, title and interest herein conveyed shall revert to parties of the first part, their heirs, or assigns."

A railroad was constructed on the "right-of-way" parcel between San Ramon and Avon, which railroad is still in operation. A station was constructed on the "station grounds," the location of which is shown in Exhibit 2, which is a survey of the property in dispute, together with adjacent property.

On September 23, 1952, the Appellee leased the property described in the complaint to MacDonald Products Co. (Ex. AA.) This lease will be referred to in this brief as the "Capwell Lease," since it was subsequently assigned to the Emporium-Capwell Com-

pany. (Ex. AC.) This lease was for a term of five years and contained no specific provision for its termination by anyone prior to the expiration of its five-year term. The trial Court found (R. 76) that because of the provision in the lease obligating Lessee to:

> "Observe and comply with all federal, state, county and municipal laws now in effect or hereinafter enacted with respect to the occupancy of said leased premises,"

that said lease was in fact terminable whenever use of the leased premises became necessary or desirable for Appellee to serve the public or its railroad patrons. There was introduced into evidence by the defendant substantially all of the leases that had been entered into covering parcels 1 and 2 described in the complaint, and *every* such lease, other than the "Capwell Lease" contained a provision authorizing defendant to terminate the lease on thirty (30) days' written notice. This very provision was deleted from the "Capwell Lease." (See Ex. AA through AN.)

In January of 1954, a supplemental agreement to the "Capwell Lease" was entered into (Ex. AB.) Under this supplemental agreement, Southern Pacific leased an additional strip of land immediately adjacent to the parcel in question within the original "right-of-way" grant to Capwell Company. The following clause was contained in the supplemental agreement *with respect to the additional strip of land:*

> "It is understood and agreed that notwithstanding anything contained in said lease, dated Sep-

> tember 23, 1952, the lease, with respect to the parcel of land shown on the print hereto attached, shall be subject to termination at any time by railroad by giving thirty (30) days' written notice to lessee to that effect."

The evidence shows that the Emporium-Capwell Company, the lessee under said lease, operates a major department store in Walnut Creek, as part of a large regional shopping center and has continuously used the premises in question for the public parking of automobiles. (R.T. 58-61.)

The area in dispute is a part of a large parking lot used by the Capwell Organization and this parking lot is separated from the railroad tracks by a chain link fence. (Exs. 2, and 3A through 3D.) Located within the area leased from Southern Pacific Company is a sign indicating that the H. C. Capwell Company is the owner of the property in question. (Ex. 3E.)

The Capwell Company neither receives nor ships merchandise by rail from its Walnut Creek store. (R.T. 59.) All shipments received by the company are by truck. (R.T. 62.) Some shipments are received at the Walnut Creek station which is approximately 348 feet from the edge of Capwell's parking lot. (Ex. 2, R.T. 54, line 10.) However, these are transported from the station to Capwell's by truck. (R.T. 61-62.) The portion of the parking lot in question consists of 1.139 acres, or approximately 28% of the original 4.04 acres station ground grant.

In view of the provisions in the lease authorizing its cancellation on short notice within the area of the original right-of-way grant, no claim to date has been made with respect to this portion of the parking lot.

Because of the evidence introduced with respect to parcel 2 showing that the lease was subject to short-term cancellation, and also in view of the evidence that the lessee of said parcel received substantial direct shipments by rail, any claim with respect to said parcel 2 was withdrawn upon conclusion of the submission of testimony to the trial Court. This was not intended to indicate that if the use of said parcel should change that appellants were waiving any claim to it.

The Trial Court found that appellants are the heirs of A. S. Botello and his wife, Maria Silva Botello. (R.T. 62.) The trial Court further found that: "The grantors in said deed dated August 6, 1890 and their heirs, having disposed of all their property adjoining parcel 1 described in the first amended complaint herein, do not have an enforceable right, claim or interest in the further compliance on the part of defendant or those claiming under defendant with the conditions contained in said deed." The opinion of the trial Court in supporting this finding stated (R. 70):

> "Furthermore, plaintiff's predecessor in interest, the original owners of the property, have disposed of their adjoining holdings. Under these circumstances there would be no basis for the

court to hold that plaintiffs are owners of a reversionary interest in parcel 1."

The record is clear that appellants and their predecessors in interest have disposed of all the property adjacent to the property in question. (See Exs. M through T.) All of the sales of adjacent property were by metes and bounds descriptions and the calls on these deeds were to the Southern Pacific right-of-way. (R.T. 29, lines 6 through 20.)

The appellee introduced evidence showing the activity of the Walnut Creek Station (R.T. 103-108.) Evidence was also introduced showing possible future plans for the parcel of property which is the subject of this litigation. (R.T. 64-98.)

SPECIFICATION OF ERRORS

The Court below erred:

1. In finding that the reversionary clause in question was intended by the grantors for the benefit of their lands adjoining the property described in the deed dated August 6, 1890, and their ownership interest therein.

2. In finding that parcel 1 has been used and held available by appellee and its predecessors in interest at all times mentioned for such railroad purposes as may have been needed and required.

3. In finding that the lease dated September 23, 1952, to MacDonald Products Co. was subject to

termination at any time, by appellee or by the Public Utilities Commission of the State of California, in the event that use of the leased premises should become necessary or desirable in order for the defendant or its predecessor to serve the public or railroad patrons.

4. In finding that defendant and its predecessor interest at all times have held and occupied parcel 1, described in appellants' complaint, for railroad purposes, and that they have never ceased to occupy said land for railroad purposes, and that the use of said parcel for a parking lot did not violate nor did it constitute a breach of any provision or requirement contained in said deed of August 6, 1890.

5. In concluding that appellee did not violate or breach any condition or requirement of the deed of August 6, 1890, and that appellee has not ceased to occupy the lands therein mentioned and described for railroad purposes.

6. In concluding that appellee has performed and complied with and is now performing and complying with each and every condition imposed or set forth in said deed.

7. In concluding that appellee has not forfeited its interest in and to said property or committed an inverse condemnation thereof.

8. In concluding that appellants do not have an enforceable right, claim or interest in the further compliance on the part of appellee or those claiming under appellee with the conditions contained in said deed.

SUMMARY OF ARGUMENT

1. The undisputed evidence shows that the property in question has ceased to be occupied for railroad purposes and that therefore appellants are now the owners of said real property.

2. Appellants, by conveying away all of their property on both sides of the original grant by metes and bounds descriptions, have not lost any of their rights to enforce the conditions of the Deed as to the property not so conveyed.

ARGUMENT

I

APPELLEE HAS CEASED TO OCCUPY THE PREMISES IN QUESTION FOR RAILROAD PURPOSES.

A. The Capwell Lease was for a term of five (5) years and was not subject to termination by the railroad or by the Public Utilities Commission.

The Trial Court properly recognized the principle of law that leases of railroad property which are cancellable on short notice and which do not interfere with the operation of the railroad do not violate the conditions contained in deeds similar to the condition in question.

City of Santa Monica v. Jones, 104 Cal. App. 2d 463, 232 P. 2d 55;
44 *Am. Jur.* 345.

Appellants have no quarrel with this rule and if, in fact, the Capwell Lease of the station grounds property was cancellable on short notice there would have

been no litigation. Upon learning that the lease on parcel 2 in the complaint was cancellable on short notice, appellants waived any present claim to said parcel. Appellants have not made any present claim to the portion of the Capwell parking lot which is within the original railroad right-of-way since the lease for that portion of the parking lot was cancellable on short notice. (Ex. AB.)

The only evidence before the trial Court to aid in the interpretation of the original Capwell Lease (Ex. AA) was the lease itself. Appellee introduced into evidence General Order No. 69 of the Public Utilities Commission of the State of California[1], and successfully contended that this General Order made the lease cancellable on short notice.

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[1]"General Order No. 69.

It is hereby ordered, that all public utilities covered by the provisions of Section 51 of the Public Utilities Act of this State be, and they are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by this Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and service of such public utilities to and for their several patrons or consumers;

Provided, however, that each such grant shall be made conditional upon the right of the grantor, either upon order of this Commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable so to do;

And provided, further, that nothing herein applies, or shall be deemed to apply to crossings of railroads or street railroads by private or public roads, passageways or footpaths, at grade or otherwise."

Since the interpretation of the lease is a legal matter this Court is not bound by the interpretation placed upon the lease by the trial Court.

Lundgren v. Freeman (9th Cir. 1962), 307 F. 2d 104.

Here any conclusion as to what the lease means must be based on application of a legal standard.

1.

The lease itself is clear and unambiguous as to its terms and as to the lack of any right of the railroad to terminate the same on short notice.

A careful reading of the lease in question (Ex. AA), the "Capwell Lease", clearly indicates the intention of the parties that it be a five-year lease with no right remaining in the railroad to terminate said lease except upon breach of the provisions thereof by the lessee. There is no provision in the lease for termination either by the railroad or by the Public Utilities Commission if it should be necessary to use the property in question for public utility purposes. As a matter of fact, when one examines the deletions and additions made to the printed lease it becomes even more obvious that it was intentionally made as a lease for a fixed term and not subject to termination or cancellation on short notice. This can be seen by comparing the Capwell Lease with the lease for the shingle yard. (Ex. AD.) The lease for the shingle yard was on a printed form substantially identical with the printed form used for the Capwell Lease, but for the Capwell Lease it was extensively and vitally modified.

In the heading of the Capwell Lease the word "limited", which modified the word "lease" on the printed form, was deleted.

In the first paragraph of the lease the words "for the term of five (5) years" were added to the lease and the following language was deleted:

> "continuing until terminated as provided in Section 8 hereof."

Said Section 8 of the lease, as printed, gave either party the right to terminate the lease by giving thirty days' written notice to that effect. This paragraph was specifically and intentionally altered to add the words: "upon the expiration of the term hereof either" party may terminate this lease by giving thirty days' written notice.

Appellee argued that paragraph 25 of the lease, which requires lessee to "observe and comply with all federal, state, county and municipal laws now in effect or hereafter enacted with respect to the occupancy of said leased premises," makes this lease terminable on short notice. However, it failed to point to any law which, without there being any specific provision in the lease, would make a five-year lease of property owned by the railroad terminable on short notice without a condemnation action being filed. Certainly, "compliance" by *lessee* would not require surrender by lessee of an estate in realty without compensation.

As has been previously pointed out, appellee was particularly careful in the supplemental agreement,

which added portions of its right-of-way to the original Capwell Lease, so as to make that portion of the parking lot located within the original right-of-way grant terminable on thirty days' written notice. (Ex. AB.) Every other lease offered into evidence, which purported to be substantially all of the leases entered into for parcels 1 and 2, contained a thirty-day termination clause.

It therefore appears that under no reasonable interpretation of the lease can it be terminated upon short notice by the appellee.

2.

The lease in question is a valid five-year lease despite any provision of Section 851 of the Public Utilities Code.

The essential question to be answered in this case is whether or not the Capwell Lease is a valid lease for five years certain. In the trial Court, appellee contended that a five-year lease would be void under Public Utilities Code Section 851. Appellants maintained that said section conclusively makes the lease valid.

Section 851, which prohibits the disposition of public utility property "necessary or useful in the performance of its duties to the public" without prior authorization by the Public Utilities Commission, is a prohibitive statute as to the utility and, rather than

being prohibitive, is *protective* as to a purchaser for value.[2]

Despite the unequivocal language in the lease establishing a five-year term, and the fact that the conveyance of the term was for a valuable consideration to one receiving it in good faith, appellant argued and the trial Court found that the lease is terminable on short notice because of Section 851 and because of General Order 69 of the Public Utilities Commission, which authorizes the granting of certain easements, licenses or permits.

It is common knowledge, not only subject to judicial notice but also adduced by evidence of the extensive holdings of appellee in Fremont and other cities, that

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[2]Section 851 of the Public Utilities Code as it read prior to amendment in 1959:

> "No public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void.
> . . .
>
> Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value."

railroads own and deal in real property, both operating and nonoperating in nature, and said properties are freely bought and sold by the carrier. It appears that the last paragraph of Section 851 of the Public Utilities Code, as applicable to sales, was enacted at the time the section was originally adopted in order to protect grantees of public utility property from just such a forfeiture as appellee proposes here. The Legislature created a conclusive presumption that property sold to a purchaser dealing with such property in good faith for value is presumed to be a property which is not "useful or necessary" in the performance by the public utility of its duties to the public.

By a 1951 amendment of Section 851 this conclusive presumption was extended not only as to good faith purchasers for value but also as to lessees and encumbrancers for value. The protection of the conclusive presumption was thus extended to the lessee in the Capwell Lease, here in question.

The statute and cases make it clear that it is *not* necessary to obtain the consent of the commission to transfer property which is not necessary or useful in the performance of public utility obligations.

Coast Valleys Gas & Electric Co., 13 C.R.C. 309 (1917);

East Bay W. Co., 13 C.R.C. 336 (1917);

Eagle Rock W. Co., 13 C.R.C. 212 (1917).

Public utilities are authorized to lease their nonoperating real property just as any private party is.

Atchison, Topeka and Santa Fe Railway Co., 48 P.U.C. 160.

The property here in question is *not operating property* but a long unused portion of the station grounds.

The last paragraph of Section 851 would be completely meaningless and surplusage if this Court were to hold that it does not apply if the property is, in fact, necessary and useful for public utility purposes.

If Section 851 applied to all necessary or useful public utility property conveyed in violation of its provisions there would be absolutely no necessity of adding the last paragraph to it. It is a fundamental principle of statutory construction that, whenever *possible*, effect should be given to a statute as a whole and to its every word and clause so that no part or provision will be useless or meaningless.

Weber v. Santa Barbara County, 15 Cal. 2d 82, 98 P.2d 492 (1940);

People v. Silver, 16 Cal. 2d 714, 108 P.2d 4 (1940);

California Code of Civil Procedure, Section 1858;

45 *Cal Jur.* 2d Statutes at 626.

It is presumed that every word, phrase and provision was intended to have some meaning and perform some useful office and a construction implying that words were used in vain or that they are surplusage will be avoided.

45 *Cal. Jur.* 2d Statutes at 627.

It is a further fundamental principle of statutory construction that "a statute must be construed so as to harmonize its various parts or sections, without

violence to the language, spirit, or purpose of the act. Wherever possible, seemingly conflicting or inconsistent provisions should be reconciled to avoid the declaration of an irreconcilable conflict and to carry out the fundamental legislative purpose as gathered from the whole act."

45 *Cal. Jur.* 2d Statutes at 627.

In keeping with these fundamental principles of statutory construction, it appears that certainly the legislature did not want public utilities to dispose of their *operating* property without prior consent of the commission. It further appears that the Legislature wanted to recognize the fact that public utilities own both operating and nonoperating property and it did not want to place the burden upon the public utility of seeking consent of the Public Utilities Commission every time that it wanted to dispose of nonoperating property. In order to accomplish this purpose the Legislature set up a rule that public utilities were not to dispose of operating property without the prior consent of the commission, but that if it did dispose of any operating property without the consent of the commission any *bona fide* purchaser for value acquiring such property could rest assured without applying to the Public Utilities Commission, that as to him the conveyance would be valid and binding. This the Legislature accomplished by creating the conclusive presumption that has been referred to so often in this brief.

It results that even if the public utility does dispose of operating property in violation of Section 851, *the*

conveyance itself is valid but the utility subjects itself to a great number of very severe penalties.

Obviously, if the utility involved was in doubt as to the status of the property it desired to transfer it would seek the consent of the Public Utilties Commission prior to making the transfer. If it was not in doubt, such as in this case, it would not seek a prior determination by the commission but would make the conveyance in question and under *any* circumstances that conveyance would be valid as to the one receiving the estate in the property so conveyed.

3.

General Order 69 of the Public Utilities Commission is not applicable to the Capwell Lease.

The trial Court found that the Capwell Lease came within the provisions of General Order 69 which authorizes public utilities to grant *easements, licenses* or *permits* for use of operative property provided the grant is made "conditional upon the right of grantor, either upon order of the commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable so to do."

a.

The Capwell Lease is not a property interest in the nature of an easement.

An easement is an interest in land in the possession of another. *Restatement of the Law of Property,* Sec-

tion 450, Subparagraph D. Under the lease in question the Capwell Company has exclusive possession of the parking lot to the exclusion of the defendant railway company. The fact that an easement and lease are inconsistent property interests is illustrated by the example set out on page 2904 of the *Restatement of the Law of Property,* as follows:

> "A, as the possessor of Blackacre, has an easement in Whiteacre, adjacent land in the possession of B. A leases Whiteacre from B for a period of ten years. As to his own ten-year possessory interest in Whiteacre, A's easement no longer exists. However, as against possessory interests subsequent to his own, he still has an easement."

b.

The Capwell Lease is not a license.

In California a license has been defined as a personal, revocable and non-assignable permission or authority to do an act or acts on the land of another, and is said not to be an interest in land.

Eastman v. Piper, 68 Cal. App. 554, 560, 229 Pac. 1002 (1924);

Von Goerlitz v. Turner, 65 Cal. App. 2d 425, 150 P.2d 278.

It is created to endure at the will of the possessor of the land subject to the privilege. *Restatement of the Law of Property*, Section 514 (b).

In distinguishing between a license and a lease the District Court of Appeal in the case of *Von Goerlitz v. Turner,* 65 Cal. App. 2d 425, 429, 150 P.2d 278 (1944), stated:

"The test . . . 'whether an agreement for the use of real estate is a license or a lease is whether the contract gives *exclusive possession of the premises against all the world, including the owner,* in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument.' " (Emphasis added) See also *Kaiser Co. v. Reid,* 30 Cal. 2d 610, 184 Pac. 2d 879 (1947); *Hammond Lumber Co. v. County of Los Angeles,* 104 Cal. App. 235, 285 Pac. 896 (1930)

C.

The Capwell Lease is not a permit.

A permit has been defined as "a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority." *Black, Law Dictionary,* Fourth Edition.

In California the terms "license" and "permit" as they relate to real property, have been used synonymously.

See:

Kaiser Co. v. Reid, supra;

Hammond Lumber Co. v. County of Los Angeles, supra.

As is true with a license, the terms permit and lease are inconsistent and since it appears that the Capwell Company has possession of the parking lot by virtue of a lease, it then cannot have either a permit or license on the parcel of property in question.

Kaiser Co. v. Reid, supra.

d.

The grant of the Capwell Lease was not made conditional upon the right of the grantor either upon its own motion or upon order of the Public Utilities Commission to commence or resume the use of the property in question whenever it might appear in the interests of its service to its patrons or consumers that it would be necessary or desirable so to do.

Unlike every other lease in evidence, which provided for termination on short notice, the Capwell Lease was not made conditional upon anything. The fact that the lessee agreed to obey all laws does not mean that the lease can be terminated on short notice since General Order 69 *contemplates that the lease itself shall contain such a condition.* There is nothing in General Order 69 which makes the provision for termination on short notice to become a part of any lease in the absence of the grant itself containing such a provision. The statute under which General Order 69 was promulgated makes the lease conclusively valid. The Public Utilities Commission has no authority to the contrary.

If, in fact, General Order 69 is a part of every lease, then again the conclusive presumption that has been so often referred to in this brief, would become meaningless. If General Order 69 is to be reconciled with Section 851 and its conclusive presumption, then it must mean that whenever a public utility company permits others to use what the utility might consider to be operating property necessary or useful for its use, then the grant by which the use of the land is to be made must contain a provision authorizing the public utility, either upon order of the Commission or upon

its own motion, to terminate the use in question whenever it appears necessary or desirable in the interest of its service to its patrons or consumers to use said property.

B. By placing it beyond its power to use said parcel for five (5) years, the appellee has ceased to occupy the premises for railroad purposes.

1.

Nature of the grant.

It is difficult to determine from a reading of the conveyance in question, by which the railroad acquired its title, the exact nature of the interest conveyed. It appears, without question, that at least one of the following interests was conveyed by this deed:

1. An easement or right-of-way for railroad purposes.

2. A determinable fee simple with a possibility of reverter.

3. A fee simple title subject to a right of entry for condition broken.

Appellants take the position that the grant in question was an easement or right-of-way for railway use. However, for purposes of this litigation, it appears that it makes little or no difference as to which one of the three interests discussed above was conveyed by the deed in question. If the railroad acquired an easement, it is submitted that they surcharged it by the lease in question causing their easement to be extinguished. If plaintiffs' interest is a possibility of reverter or a right of entry for condition broken, then it is submitted that the same breach of condition by

defendant has caused fee simple title to revert to plaintiffs.

a.

The grant in question conveyed a right-of-way or easement for railroad uses.

While it is true that the grant is in a form used for conveying title in fee simple, nevertheless there is a qualification limiting the use of the property in question for railroad purposes. Furthermore, the deed recites a nominal consideration of $1.00. It is a general principle of construction that "in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee."

Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P.2d 15 (1956);

See also:

City of Glendora v. Faus, 148 Cal. App. 2d 920, 307 P.2d 976 (1957).

The fact that no monetary consideration or only a nominal monetary consideration was paid for the grant is also a factor of considerable importance, indicating that the grant conveys an easement and not a limited fee.

Tamalpais etc. Co. v. N. W. Pac. R. R. Co., 73 Cal. App. 2d 917, 928, 167 P.2d 825 (1946).

b.

If the deed in question did not convey an easement or a right-of-way, then it conveyed title in fee simple subject to a right of entry for condition broken or a determinable fee simple.

In the case of the fee simple subject to a right of entry for condition broken, a demand for re-entry is required before the estate reverts to the grantor or his successor in interest. In the case of a determinable fee simple, title automatically reverts upon breach of the condition. See article "Future Interests in California" by Professor Harold E. Verrall, 7 West's Civil Code Ann., p. 1. See also *McDougall v. Palo Alto School District,* 212 A.C.A. 420; *Alamo School Dist. v. Jones,* 182 Cal. App. 2d 180, 6 Cal. Rptr. 272.

In the event that the railroad acquired title in fee simple and not an easement, it is submitted that title has reverted to appellants either automatically upon entry by appellee into the Capwell Lease or upon notification by appellants that they had breached this condition and the subsequent demand for re-entry that was made by appellants by letter (Exs. 4A and 4B) and by the filing of this suit.

C. An analysis of the words in question clearly indicates the condition has been breached.

1.

Cease.

It should be pointed out that there is no requirement that appellee abandon the premises in order for the condition contained in the Deed to come into effect. The fact that "cease" and "abandon" are not synonymous is indicated in the case of *Bradner v. Vasques,*

102 Cal. App. 2d 338, 341-42, 227 P.2d 559 (1951), where the Court defined "cease" as follows:

> ". . . The word 'cease' is defined to mean; 'To come to an end; to stop; to leave off or give over; to desist . . . To put a stop to . . . To cause to stop or desist from some action. To bring to an end; to discontinue or leave off.' (Webster's International Dict. 2d ed.) Webster says that *'cease' applies 'to that which is thought of as being.' The antonym of cease is 'continue.'* (Webster's Dict. of Synonyms, 1st ed.)" (emphasis added)

In view of the fact that the lessee has exclusive possession of the parking lot and that it does not contribute to the railroad, either by making or receiving shipments at or adjacent to the property involved, it certainly appears that there is not a railroad use in being on the premises at the present time or since, at least, 1952. If there is not a railroad use in being and if the property in question had been used for railroad purposes, then certainly it ceased being used for railroad purposes at the time of the Capwell Lease.

2.

Railroad purposes.

A non-terminable five-year lease of property to a regional department store for purposes of a public parking lot, where neither the property leased nor the adjacent property of the department store is used for sending or receiving shipments by rail, does not constitute a use of property for railroad purposes.

It is true that many uses which would on their face not appear to be railroad uses have been upheld where

the uses facilitate the transaction by a railroad of its ordinary business, 74 C. J. S. p. 500, or which are used for convenience in delivering or receiving freight. 74 C. J. S. 508. Other authorities have permitted the leasing of restricted railroad property for businesses which contribute to the railroad's business. See *City of Long Beach v. Pacific Elec. Ry.,* 44 Cal. 2d 599, 603, 283 P.2d 1036 (1955).

As has been previously stated, cases have upheld the use of restricted railroad property where the leases were subject to cancellation on short notice by the railroad.

The Capwell parcel does not fit into any of these categories. It certainly does not facilitate the business of the railroad, it does not contribute to the railroad's business, and it is not subject to termination on short notice. This Court can take judicial notice of the fact that the operation of a parking lot to serve a large regional department store is a big business and, incidentally, is a business which rather than contributing to railroad business, probably over the last twenty years has eliminated a great deal of the passenger business formerly handled by the railroads. The Courts of this land have been quick to grant relief to owners of property where railroads have violated conditions set forth in the grant, despite the numerous technical arguments that the railroads may have made.

Rosecrans v. Pacific Elec. Ry. Co., 21 Cal 2d 602, 134 P.2d 245 (1943);

Faus v. Pacific Elec. Ry. Co., 146 Cal. App. 2d 370, 303 P.2d 814 (1956);

City of Glendora v. Faus, 148 Cal. App. 2d 920, 307 P.2d 976 (1957);

Bond v. Texas and P. Ry. Co., (Louisiana) 160 So. 406 (1935);

Sparrow v. Dixie Leaf Tobacco Co., (North Carolina) 61 S.E. 2d 700 (1950);

Connolly v. Des Moines & Central Iowa Co., (Iowa) 68 N.W. 2d 320 (1955);

Virginia N. Railway Co. v. Avis (Virginia) 98 S.E. 638.

In the case of *Sparrow v. Dixie Leaf Tobacco Co., supra,* plaintiff brought an action in ejectment against a railroad which had a right-of-way over his land and against a tobacco company which was using a portion of the right-of-way. In 1935 the tobacco company acquired title to a tract of land adjacent to the railroad right-of-way and erected tobacco storage warehouses on this parcel. In 1936 the railroad leased a part of its right-of-way adjoining said property to the tobacco company, and there were constructed two storage warehouse buildings which were extensions of the building originally erected by the tobacco company on their own property. A sidetrack was installed by the railroad to serve these buildings. No protest was made to the construction or occupancy of these buildings prior to January, 1949. The trial Court held that this use was for railroad purposes. In reversing the judgment of the trial Court, the Supreme Court stated:

> "It may devote the right-of-way to any use which is indispensable to, or which will facilitate the fulfillment of, the objects of its corporate existence

> as a common carrier, or which is reasonably in aid of those purposes. 44 A. J. 338. Ownership of the easement carries with it the right to use the property within the bounds of the right-of-way for any purpose, the primary object of which is the furtherance of the business of the railroad. So long as the use to which the easement is subjected comes within this rule, the owner of the servient estate has no cause to complain, for the grant of the easement was for such purpose and constitutes a part of the dominant estate. The use, however, must be reasonably necessary for or convenient to the operation of the railroad. (Citations omitted)
>
> "On the other hand the railroad company possesses no right of authority to use or to let the property for private or non-railroad purposes . . . It cannot erect or permit the erection of warehouses, factories and the like, not necessarily connected with the use of their franchise, within the limits of their right-of-way. When property is taken for railroad purposes, the fee remains with the owner and, outside of the authorized use, the proprietary right is in the original owner. (Citations omitted) . . ."

In *Bond v. Texas and P. Ry. Co.* (Louisiana) *supra,* the Court enjoined a railroad from leasing a portion of its right-of-way to a cotton gin company for purposes of operating a gin for private purposes.

In *Connolly v. Des Moines and Central Iowa Railway Co.* (Iowa) *supra,* plaintiff sought to enjoin the

defendant's condemnation of a railroad right-of-way, contending that the property had reverted to them for the reason that the deed provided for operation of a railway by electricity and because diesel locomotives had been substituted for electricity. The deed further required the operation of a passenger line and such freight as might be incidental to said business and passenger service had been discontinued. The Court, in upholding the reversionary clause, stated at page 324 of its opinion:

> "Defendant first contends there was no violation of the terms of the Nourse conveyance as to cause the right-of-way to revert. The argument is based on the evidence that the area is served now by passenger buses operating on streets and the deed should be interpreted in the light of modern methods of passenger transportation. There is no merit in the argument. This strip of right-of-way was never condemned. The parties in effect contracted that the right-of-way would revert in the event the electric railroad passenger service would be discontinued. They had a right to contract as they wished. If the original grantee did not like the terms pressed upon it by the owner, it could have condemned. It avoided condemnation by accepting something less than full rights and, theoretically, at least, by paying something less than full compensation."

It is thus apparent from these cases that the Courts will lend meaning to the intention of the parties as expressed by their language in the conveyances in question.

3.

Occupy.

In the case of *People v. Simon*, 66 Cal. App. 2d 860, 153 P.2d 420 (1944), the Court referred to Funk & Wagnall's Standard Dictionary to define occupy, as follows:

> "To use or employ in an exclusive manner; to take and hold possession of; inhabit."

This short definition clearly indicates that one cannot occupy that which it does not have the right to possess.

4.

Cease to occupy.

The phrase "cease to occupy" has been defined by the Supreme Court of Minnesota in the case of *Quehl v. Peterson,* 49 N.W. 390, as used in the Homestead Exemption Laws of that state, as meaning a "cessation of actual occupancy and residence, though accompanied with an intention to return and resume such occupancy." This interpretation appears to be a common sense and logical one. If the parties had intended to use the word "abandon" rather than "cease to occupy" they would have used that word. Defendant does not possess the premises in question and therefore does not occupy it presently for any purpose.

5.

Said premises.

Appellee argued in the Trial Court that as long as it devotes any portion of the 4.04 acre parcel to railroad purposes that it has complied with the condition in the

deed. Certainly this construction by the appellee would do violence to the intention of the parties, since, if appellee's contention is correct, then it could construct a small shed for storing a few items of railroad equipment on one corner of the parcel and could lease the balance on a 99-year lease for the highest type of commercial development.

The doctrine of partial reversion has been recognized by the Courts of this state as well as the Courts of other states:

Tamalpais Land and Water Co. v. N. W. Pac. RR. Co., 73 Cal. App. 2d 917, 167 P.2d 825 (1946);

Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123 (Georgia);

Virginian Railway Co. v. Avis, 98 S.E. 638 (Virginia).

In the *Tamalpais* case the California District Court of Appeal, in reversing a judgment directing a verdict in favor of defendant railroad and ordering a retrial, pointed out at page 929 of its opinion:

> "If the 1893 deed conveyed a fee subject to a condition subsequent, in a proper case there can be a partial violation and a partial reversion. On the other hand, if it conveyed a mere easement, the law is well settled that there can be a partial extinguishment of such easement. (See Restatement of Property (Servitudes), chapter 41, p. 3060, Introductory Note.) There are many cases where the courts have held, in reference to deeds conveying property rights to a railroad, that a

> partial abandonment extinguishes so much of the right as has been abandoned. (Citations omitted) One of the most interesting and best reasoned cases on this subject is *Atlantic Coast Line R. Co. v. Sweat*, 177 Ga. 698 [171 S.E. 123]. In that case certain lands were conveyed to the railroad for the construction of a railroad thereon, the grantee to retain the lands for so long as it or its 'successors and assigns, shall maintain and use said road; but to revert to the said party of the first part whenever said road shall be abandoned.' In the amended complaint it was alleged that the railroad had constructed the road and thereafter abandoned a portion. The court held that the plaintiff could recover the portion abandoned even though the balance was being used for railroad purposes. The court stated (p. 130 [171 S.E.]): 'While upon a technical construction of the contract it might be considered as entire and not divisible, so that the railroad company would not lose its claims to any part of the right-of-way so long as it maintained and used substantially all of it, yet, when there was a definite and positive nonuser by the railroad company of a particular segment of the right-of-way formerly occupied by it, the company itself is responsible for the severance, and will not be heard to say that the contract is indivisible. An entire contract may be apportioned in some cases.'"

In *Virginian Railway Co. v. Avis, supra,* plaintiff conveyed property to the railroad with the granting clause containing the following sentence:

> "The above granted land is to be used for depot purposes and facilities connected therewith."

Two small parcels were conveyed under this deed. On the larger of the two parcels the railroad erected and maintained a passenger freight depot. The smaller parcel was leased under a contract which could be cancelled at any time and there was erected on this parcel, by the lessee, a warehouse, a storehouse, a shed, and a cotton gin. The position of the railroad, as expressed by the Court at page 638 of this opinion was as follows:

> "That as much of the land as may be necessary therefor shall be used for depot purposes and facilities connected therewith, and that unless and until all of the land shall be required for that purpose, the company has the right to use the residue for any legitimate purpose, so that such purpose be not inconsistent with the future use of the property for depot and railroad purposes when and as necessary."

The Supreme Court of Appeals of Virginia, in anwsering this contention, stated at page 639 of its opinion:

> "The purpose of all written contracts and conveyances is to say what the parties mean, and the only legitimate or permissible object of interpreting them is to determine the meaning of what the parties have said therein. In doing this, the language used is to be taken in its ordinary signification, unless it has acquired a peculiar meaning with reference to the subject matter, or unless the context plainly shows that such language is used in some other peculiar sense. . . .
>
> "A conveyance of land to a railway company 'to be used for depot purposes and facilities con-

> nected therewith,' if taken upon its face and given its primary and most apt and natural meaning, immediately conveys the thought that the company will be expected to use at least a part of the land for a depot, and the residue for facilities connected therewith; and to say that it means that the company will use only such part as it needs for a depot and incidental facilities, and may lease the residue to outsiders for business purposes wholly apart from its passenger and freight operations, is to say something which the parties did not say, and to ascribe a meaning to their words which comes as a second thought and finds its support not in the words used, but in a refinement or construction based upon secondary and inapplicable rules of interpretation. The secondary rules will be presently mentioned; but we say that they are inapplicable because, if it be conceded that the covenant is not clear on its face, we must next look to the circumstances surrounding its execution, and they certainly remove all doubt as to its meaning."

It is therefore submitted that because of the breach of the condition as outlined herein, fee simple title was vested in plaintiffs free and clear of any rights of the defendant to parcel 1 described in the complaint.

D. A very recent decision of the California District Court of Appeal supports appellant's position.

The California District Court of Appeal, First District, Division One, recently had before it the case of *McDougall v. Palo Alto School District,* 212 A.C.A. 420. This case was decided on January 29, 1963. The

deed in question involved a school house and it provided for the property to revert if the school district "shall abandon the premises hereby conveyed for school purposes or shall fail, neglect or refuse to use said premises for common school uses." The Trial Court found that though the school building was not being used, that there was no automatic defeasance of the district's title. The Trial Court based its findings upon the fact that plans had been discussed for a new school at the site and therefore concluded that no abandonment was intended. In reversing the Trial Court, the District Court of Appeal stated that abandonment was not a necessary condition for "any failure, neglect or refusal to use the property for common school uses and purposes." would terminate the school's interest in the property. The Court went on to state at page 437 of its opinion:

> "Thus, even if we should accept the court's conclusion that the district never *abandoned* the land, it is beyond dispute that for almost twenty (20) years it failed to *use* it for school purposes."

"Failed to use" and "cease to occupy" would be almost synonymous in meaning and therefore it would appear that the *McDougall* case is very parallel to the instant case.

It is therefore submitted that appellee has breached the condition in the Deed and that fee title to the premises is now in appellants.

II

APPELLANTS ARE THE OWNERS OF THE PARCEL IN QUESTION AND ARE ENTITLED TO MAINTAIN THIS ACTION.

A. The findings of fact show that appellants are the owners of said parcel.

The Trial Court found that appellants are the heirs of the original grantors of the parcel in question, A. S. Botello and Maria Silva Botello, his wife. (R. 72.) It further found that "said grantors and their heirs disposed of all of their lands which *adjoined* a portion of the property conveyed to said Southern Pacific Railroad Company." (R. 77.) It also found that appellants, at the time of the commencement of the action "were not and none of them was then the owner of the lands adjoining said Parcel 1, or any part thereof." (R. 77.) The Trial Court carefully avoided making any finding of fact that appellants or their predecessors in interest had disposed of any interest that they may have had in Parcel 1. With these Findings of Fact the Trial Court concluded that because all of appellants' adjacent property had been disposed of that they "do not have an enforceable right, claim or interest in the further compliance on the part of defendant or those claiming under defendant with the conditions contained in said deed." (R. 79.)

If this conclusion is correct then it is submitted that there is no one in existence who can enforce the conditions contained in the 1890 deed and therefore the railroad would be in a position to do whatever it wanted with the property in question despite the

contract it made with A. S. Botello and Maria Silva Botello.

B. Appellants and their predecessors in interest have conveyed away the adjacent property by metes and bounds description, none of which described the station grounds or the right-of-way and thus appellants still retain an interest in these two parcels of property.

The evidence is clear and uncontradicted that all the conveyances of the property adjacent to the station grounds and the railroad right-of-way was by metes and bounds description. This was testified to by the Southern Pacific Company engineer. (R.T. page 29, lines 6 through 20.) The maps prepared by the appellee's engineers also show that the descriptions did not include the property in question. (Ex. M through T.)

In the Trial Court appellees argued that a conveyance of land bounded by a railroad right-of-way passes title to the center of the right-of-way. Their argument was based upon the provisions of Sections 831 and 1112 of the Civil Code of the State of California. Section 1112 provides in substance that a transfer of land bounded by a *highway* passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof *unless a different intent appears from the grant.* The appellees successfully argued to the Trial Court that railroad rights-of-way, in essence, are highways and therefore, despite the fact that the statute does not refer to railroad rights-of-way it still should be applied.

It should be pointed out that on the west side of the railroad tracks we are talking about both a railroad right-of-way, to wit: the 100 foot strip of land upon which the railroad tracks are located, and the "station grounds," the 100 foot wide strip of land upon which the railroad station is located. As the Court can see from viewing a plat of the station grounds (see Exs. 2 and W) these grounds do not run the length of the right-of-way but for a relatively short distance large enough in size to take care of the permanent facilities installed at the Walnut Creek Station. The station grounds also are apparently large enough to lease out portions thereof for private facilities such as the parking lot in question.

Assuming for the sake of argument that these two sections of the Civil Code apply to railroad rights-of-way, there certainly would be no reason why they should apply to the station grounds since the station grounds are no different from any other piece of private property. There is no question that a deed that would refer to a conveyance of private property would not include to the center of the private property unless the intention of the parties clearly appeared to the contrary. Thus the Trial Court's finding that a conveyance to the boundary line of the station grounds deprived appellants of all of the rights in and to said station grounds would appear to be without support either in evidence or in law.

The California Courts have held that the provisions of Sections 831 and 1112 of the Civil Code are simply rules of construction and excluded from these rules

of construction is the situation where the description of a property used is a sideline of the street, rather than the street itself as a boundary.

Speer v. Blasker, 195 Cal. App. 2d 155, 159, 15 Cal. Reptr. 528 (1961);

Warden v. South Pasadena Realty, etc. Co., 178 Cal. 440, 442, 174 Pac. 26 (1918);

Severy v. Central Pacific R. R. Co., 51 Cal. 194, 197, (1875).

In *Speer v. Blasker, supra,* plaintiff sought to quiet title to a strip of property 40 feet wide and 203.56 feet long, which was formerly a part of a street. The defendants claimed a portion of the street on the theory that the deed to them conveyed title to the center of the street in question as a matter of law. The defendants had acquired title to their property by a metes and bounds description, which used the sideline of the street, rather than the street itself as a boundary. In holding that the defendants had no interest in any portion of the street, the Court stated at page 159 of its Opinion that the rule set forth in Section 1112 of the Civil Code did not apply because:

> "Excluded from the rule, because the reason therefor does not apply, is a deed wherein the description of the property conveyed uses a sideline of the street, rather than the street itself, as a boundary."

In *Severy v. Central Pacific R. R. Co., supra,* the description was as follows:

> "Thence *along the easterly line* of Sacramento Street 150'."

The Supreme Court of our State in holding that the deed meant what it said, stated:

> "It is very clear, therefore, that the parties to the instrument intended that the lots should run up to the eastern line and not to the middle of the street."

It is a further rule of law in our State that where a metes and bounds description is used, the rule set forth in Section 1112 of the Civil Code does not apply.

City of Redlands v. Nickerson, 188 Cal. App. 2d 118, 10 Cal. Rptr. 431 (1961).

See also

Jones v. Braumbach, 193 Cal. 567, 226 Pac. 400 (1924);

Berton v. All Persons, 176 Cal. 610, 614, 170 Pac. 151.

Here it is uncontradicted that a metes and bounds description was in fact used. If the Court is to re-write the deeds to the adjacent property, then the Court will create an ambiguity in the deeds which did not exist when they were written in that the boundaries will not close. As testified to by the Southern Pacific Company engineer the boundaries do not include any portion of the railroad property. If the Court were to include the railroad property obviously the distances shown on the deed would be in error. Since the deeds are clear and unambiguous it is submitted that they should not be re-written by the Court to include property not intended to be included by the parties. It is submitted that the Trial Court in this

case has fallen into the same error committed by the Trial Court in the case of *Goodman v. Southern Pacific Co.,* 143 C.A. 2d 424, 299 P. 2d 321. In the *Goodman* case the plaintiffs under the provisions of a deed similar to the one in this case sought declaratory relief as to portions of land which they alleged were not being used for railroad purposes. The Trial Court and the Appellate Court found that because of the long delay involved, they would not at that time enforce any rights the plaintiffs may have had to the property in question. The Trial Court's judgment indicated that because of plaintiff's laches the property might be put to any use in the future, which the railroad desired. In modifying the judgment of the Trial Court, the District Court of Appeal stated, at page 429 of its Opinion:

> "The judgment as it stands perhaps might be subject to the interpretation that the property may be put to any use in the future which does not interfere with railroad purposes. We think that the judgment should be limited, and it is not unlikely that the court intended so to do, to denying forfeiture or reentry because of past and present uses and because of nonuse of part of the land and to retaining in general the reversionary right of plaintiffs. Although the action was denominated one for declaratory relief, essentially it was one to declare a forfeiture, and the answer simply prayed that plaintiffs take nothing. Accordingly, the judgment is modified to deny that forfeiture or reentry be decreed because of past or present use of parts of the land or for nonuse of other parts, and to preserve the reversionary right as contained in the deed."

Under the Findings of Fact and Conclusions of Law, as well as the Judgment in this case, it appears that the Southern Pacific Company is free to do with the property in question anything that it desires despite the contract that it entered into in 1890 with the owners of the property. We are sure that this was not the Trial Court's intention in this matter, however it is the only conclusion that one can come to in reviewing the Findings of Fact and Conclusions of Law.

It is submitted that even if this Court should decide that appellee has not violated the terms and provisions of the 1890 deed, that like in the *Goodman* case appellants herein should not be deprived of any right, title or interest they may have in and to the property in question.

III

CONCLUSION

There were many points raised in the Trial Court relating to the jurisdiction of the Court and numerous affirmative defenses raised by appellees, none of which were decided by the Trial Court. Therefore no reference is being made to these points in this brief.

It is therefore submitted that the judgment of the Trial Court should be reversed and that title to the property in question should be quieted in appellants.

Dated, Fremont, California,
June 21, 1963.

LeRoy A. Broun,
Bernard M. King,
By Bernard M. King,
Attorneys for Appellants.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Bernard M. King,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix

LIST OF EXHIBITS
(Pursuant to Rule 18, 2(f))

Plaintiff's Exhibits	Identified	Offered	Received
1	33	33	33
2	37	37	37
3-A	37	37	37
3-B	37	37	37
3-C	37	37	37
3-D	37	37	37
3-E	56	56	56
4-A	56	56	56
4-B	56	56	56
5	82	87	87

Defendant's Exhibits	Identified	Offered	Received
A	15	23	23
B	15	23	23
C	15	23	23
D	18	23	23
E	18	23	23
F	15	23	23
G	18	23	23
H	18	23	23
I	18	23	23
K	23	23	23
L	23	23	23
M	18	23	23
N	18	23	23
O	18	23	23
P	18	23	23
R	18	23	23
S	18	23	23
T	18	23	23

Defendant's Exhibits	Identified	Offered	Received
U	18	23	23
V	18	23	23
W	18	23	23
X	57	57	57
Y	63	63	63
AA	19	23	23
AB	20	23	23
AC	20	23	23
AD	23	23	23
AE	23	23	23
AF	23	23	23
AG	23	23	23
AH	23	23	23
AI	23	23	23
AJ	23	23	23
AK	23	23	23
AL	23	23	23
AM	23	23	23
AN	23	23	23
AO	66		
AP-1	71		
AP-2	71		
AP-3	71		
AP-4	71		
AQ	100	102	102
AR	101	102	102